

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION THIRTEEN

ENGINEERING CONSULTING  
SERVICES, LTD

Employer

And

Case 13-RC-21119

INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 150,  
AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on the petition was held on December 1 and 2, 2003, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.<sup>1</sup>

**I. ISSUES**

The Petitioner seeks an election within a unit comprised of approximately 20 field technicians and laboratory technicians employed by the Employer at its facility currently located at 1575 Barclay Boulevard, Buffalo Grove, Illinois. The Employer only contests the appropriateness of the unit by maintaining that field technicians are employed in the capacity of guards within the meaning of Section 9(b)(3) of the Act.<sup>2</sup> The Employer therefore asserts that the petition must be dismissed pursuant to Section 9(b)(3) because it is undisputed that the Petitioner represents and accepts into membership employees who are not guards within the

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<sup>1</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>2</sup> At the outset of the hearing, the Petitioner amended the Petition to include lab technicians, while the original petition named only field technicians. Immediately thereafter, the Employer stated its position on the appropriateness of the unit, claiming that the petitioned-for "unit [employees] are guards", without delineating between the two types of technicians named in the newly amended petition. However, the Employer's brief only asserts that field technicians are statutory guards. Thus, although the Employer may have initially stated a position that could be read to claim that field and lab technicians are guards, by its brief I find that it has limited its argument to claiming only that field technicians are guards. However, I also find that there is no evidence that lab technicians engage in any duties sufficient to qualify them as guards within the meaning of Section 9(b)(3) of the Act.

meaning of the Act. The Petitioner, on the other hand, maintains that the field technicians do not perform any job functions traditionally performed by guards nor do they possess or perform any guard-like responsibilities or duties within the meaning of Section 9(b)(3) of the Act. As such, the Petitioner argues that field technicians are not guards and seeks to have the Regional Director direct an election in the unit noted above.

## **II. DECISION**

For the reasons set forth below, including the absence of any traditional indicia of guard status, such as employee training in security procedures; weapons training and possession; participation in security rounds or patrols; job functions that include the monitoring or controlling of access to the Employer's or other premises; or the wearing of uniforms, I find that field technicians are not guards within the meaning of Section 9(b)(3) of the Act.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time field technicians and laboratory technicians employed by the Employer at its Buffalo Grove, Illinois facility; but excluding all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and all other employees.

The unit found appropriate herein consists of approximately 20 employees for whom no history of collective bargaining exists.

## **III. STATEMENT OF FACTS**

The Employer, Engineering Consulting Services, Ltd., operates a licensed professional engineering firm specializing in providing consulting services in three primary areas: geotechnical, environmental, and construction materials engineering.<sup>3</sup> Geotechnical consulting involves the engineering associated with soil, rock and other earthen materials. Environmental consulting mainly concerns issues related to soil and groundwater contamination. Construction materials engineering ("CME") consulting involves monitoring various types of construction projects such as buildings, roadways, water treatment facilities, and sewers, primarily on behalf of project owners, structural or design engineers, and architects. The Employer's CME services are designed to render independent engineering oversight to ensure that the materials and processes utilized during construction work conform to industry standards and project specifications. The industry standards that the Employer uses are developed by various entities, such as the ASTM International, (formerly the American Society for Testing Materials), the American Concrete Institute, and the American Welding Society and the American Institute of Steel Construction.

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<sup>3</sup> The Employer does not claim, nor is there any evidence in the record showing, that the Employer operates as a professional security firm within the meaning of *The Illinois Private Detective, Private Alarm, Private Security, and Locksmith Act of 2004*, 225 ILCS 446/1 et seq.

The field technicians at issue are involved in the Employer's CME work. Field technicians work under the direction and supervision of a licensed professional engineer.<sup>4</sup> Field technicians are typically stationed at the customer's construction sites to document the construction process and to conduct field tests on the materials used. Specifically, field technicians inspect various forms of concrete, masonry materials, fireproofing products, reinforcing steel (or "re-bar"), structural steel, as well as soil and asphalt compaction and content. The field technician's job functions also include an immediate on-site review of certain construction materials and permanent application techniques such as welding, the laying of concrete, and application of fireproofing materials to ensure that the materials being applied or formed comply with established industry standards before application.

In the event that field technicians observe discrepancies between the construction materials or work and the specifications or industry standards, Brett Gitskin, the Employer's vice president, testified that it is the field technicians duty to bring the discrepancy to the attention of one of the Employer's engineers.<sup>5</sup> However, field technician Steve Martin testified that there are times when a field technician will approach the tradesperson directly regarding work that person is doing. For example, if a soil compaction test shows that more compaction is necessary, the field technician may speak directly with the operator of the rolling machine to relay the fact that more rolling is necessary to achieve the proper test results. There is no evidence however, that the field technicians have any authority to force or require a tradesperson to follow their suggestions. Similarly, depending on the issue, Martin testified that he may speak to a foreman about other issues; such as if he observes structural steel being placed improperly. According to Martin, once the field technician tells the foreman about the problem, the foreman "take[s] care of it from there." Significantly, Martin also testified that several managers and engineers at the Employer told him that he is not vested with the authority to halt work on a project. Rather, if he is unable to resolve a problem by going to a foreman or the project superintendent, he merely reports the discrepancy to the Employer's project engineer who is overseeing the work. The field technician's responsibility after that point is merely to answer any questions the engineer may have while attempting to resolve the problem. In addition, since the only Employer employees on a given construction site are field technicians, all of the workers a field technician may deal with during the course of his or her work are employees of entities other than the Employer.

After the field technicians perform the various field tests, collect the samples, and document the construction process, they prepare a handwritten field report summarizing the data and whether the materials/processes meet project specifications and industry standards. This report is then typed by a secretary and submitted to the Employer's professional engineering staff, where two engineers review the report to make sure it is a proper, consistent, professional report. Brett Gitskin also reviews the reports before submission to the customer. Ultimately, the report is a concise written statement as to what the field technicians observed, documented, and reported to the professional engineers for analysis as to whether the work performed and the materials used in the work conform to industry standards and what the design engineer

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<sup>4</sup> The parties stipulated that field technicians do not engage in any traditional security guard-like functions, such as wearing a uniform, carrying a gun, or protecting the Employer's premises or the construction sites from damage or theft by employees or third parties.

<sup>5</sup> Gitskin also holds the following titles at the Employer: branch manager, regional manager, and senior principal engineer for the facility at issue here.

developed in the project specifications. As succinctly noted by Mr. Gitskin, “we are hired to observe, document, test and report. That’s what we’re hired to do, to help assure the contractor does it right.”

#### IV. DISCUSSION

As noted above, I find that the field technicians operating out of the Employer’s Buffalo Grove, Illinois facility are not guards within the meaning of Section 9(b)(3) of the Act.

Section 9(b)(3) of the Act provides that labor organizations which admit into membership employees who are not guards may not be certified as the collective-bargaining representative of a unit of guards. Section 9(b)(3) also defines a guard as “any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of person on the employer’s premises.” See *J.C. Penney Co.*, 312 NLRB 32 (1993). That is to say, under Board law, an employee is a guard if the employee’s basic function is the protection of property of the employer or its customers, and the employee must be “directly and substantially” engaged in the protection of customer property. *Pony Express Courier Corp.*, 310 NLRB 102, 103 (1993). Merely inspecting or “checking” production for accuracy or count does not make a person a guard. *Tac/Temps*, 314 NLRB 1142, 1143 fn. 5 (1994). Similarly, the performance of job duties associated with the observing and reporting violations of rules does not necessarily constitute guard duties within the meaning of the Act. *Lion Country Safari*, 225 NLRB 969, 970 (1976). Instead, the Board considers the characteristics of the employee’s duties and of the employer’s operations. *Arcus Data Security Systems*, 324 NLRB 496 (1997).

In the instant matter, it is undisputed that the job duties of the field technicians do not encompass any of the traditional indicia of statutory guard status. See, e.g. *Wolverine Dispatch, Inc.*, 321 NLRB 796, 798 (1996). Specifically, field technicians are not trained in any aspect of security procedures; do not participate in nor are they required to participate in weapons training and possession; do not participate in security rounds or patrols; and they do not have any responsibility for the monitoring or controlling of access to the various job sites at which they perform their testing and reporting functions. Instead, the basic function of the field technician is to provide detailed on-site observation and testing of work performed during the building and construction process. These duties stand in sharp contract to the typical duties of security personnel who, as noted by the Board in *Deluxe General Incorporated*, 241 NLRB 229, 230, “perform a role apart from the actual production process and are often most active when production has ceased.”

In its brief, the Employer advances three arguments. First, it claims that the fact that field technicians lack any traditional police functions is not dispositive of whether they are guards within the meaning of the Act. The Employer then notes that under the Act, a guard is one who is charged with protecting the employer’s property and enforcing rules against fellow employees. While, as noted above, this is an accurate general statement of the law, this fact, in and of itself, does nothing to support the Employer’s position since the parties stipulated that field technicians do not protect the Employer’s property and there is no evidence that they enforce work rules against fellow employees.

Second, the Employer argues that employees may be guards when they merely monitor and report problems or rule violations, but do not personally enforce rules against others or otherwise intervene. To support this claim, the Employer cites *Rhode Island Hosp.*, 313 NLRB 343, 346-47 (1993). In that case, the Board found that shuttle van drivers were guards despite the fact that their main duty was to shuttle employees from building to building. *Id.* The Board also noted, however, that the shuttle drivers at issue were responsible for reporting security problems and rule violations, and were charged with personally “respond[ing] to threatening situations when needed.” *Id.* Accordingly, the Board found that the shuttle van drivers were specifically charged by their employer with guard responsibilities that were more than a minor or incidental part of their driving duties. *Id.* Therefore, *Rhode Island Hosp.* does support the Employer’s argument because employees at issue there were charged with the duty of responding to threatening situations and were specifically found to possess guard-like duties beyond merely monitoring and reporting security problems. That is not the case here.

Third, the Employer offers a quote from *American District Telegraph Co.*, 160 NLRB 1130, 1136 (1966), apparently to assert that the monitoring work performed by the field technicians is still that of a guard, even though the trades’ people whose work they monitor are not fellow employees. In *American District Telegraph Co.*, (or “ADT”) the employer installed and maintained electronic security systems. The employees found to be guards in that case, the “S-2’s”, patrolled customer premises and investigated any indication of trouble or malfunctioning equipment, and were dispatched to customer’s premises to response to fire and burglar alarms, or calls from the customers. They also wore uniforms with caps and badges, and carried pistols. Thus, I find that *American District Telegraph Co.*, like *Rhode Island Hosp.*, is plainly distinguishable from the employees at issue here.

Despite the fact that the cases it cites are readily factually distinguishable from the employees at issue, the Employer nonetheless maintains that the primary function of the field technician is the enforcement of work rules designed to protect the property interests of the owner as well as various tradesmen and employees working on the jobsite. In essence, the Employer argues that the act of providing on-site review services mandates finding that the field technicians are guards because the ultimate goal is to ensure the safety of the workers while they work on the site and of the property’s ultimate users by ensuring that construction standards and the project specifications are followed. I find, however, that this expansive reading of Section 9(b)(3) is wholly unsupported by the applicable case law noted above. Rather, as part of the construction process, they monitor work to ensure the project is built according to project specifications and applicable industry standards. Thus, the field technician’s duties do not present them with the potential for divided loyalty where they are called upon to protect property against fellow union members, particularly during a labor dispute, which is the recognized function of Section 9(b)(3). See, e.g., *McDonnell Aircraft Co.*, 827 F.2d 324, 329 (1987).

In sum, I find that field technicians possess none of the responsibilities necessary to support the Employer’s claim that they are guards within the meaning of Section 9(b)(3) of the Act. Accordingly, I conclude that field technicians are not guards within the meaning of Section 9(b)(3) and that the Petitioner is therefore eligible to serve as their representatives for purposes of collective bargaining, if so elected.

## **V. DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of intent to conduct election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the issuance of the notice of intent to conduct election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Union of Operating Engineers, Local 150, AFL-CIO; or no labor organization.

## **VI. NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be stopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## **VII. LIST OF VOTERS**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be

timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois 60606 on or before **January 13, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

#### **VIII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by January 20, 2004.

DATED at Chicago, Illinois this 6<sup>th</sup> day of January 2004.

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Harvey A. Roth, Acting Regional Director  
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Region Thirteen  
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